1972

The State of Utah v. Roy S. Ludlow : Brief of Defendant-Respondent

Utah Supreme Court

In The Supreme Court of the State of Utah

THE STATE OF UTAH,

Plaintiff-Appellant,

vs.

ROY S. LUDLOW,

Defendant-Respondent.

Brief of Defendant-Re

APPEAL FROM THE DIS
OF THE THIRD JUDICI
FOR SALT LAKE COU
HONORABLE FRANK D.

PAUL A.
Attorney
Respond

VERNON B. ROMNEY, A
WILLIAM T. EVANS, As
CARL J. NEMELKA, Coun
DONALD SAWAYA, Deput
LARRY R. KELLER, Deput
Attorneys for Plaintiff-Appell

BRAINE PRESS 1897 SOUTH MAIN STREET

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CASES AND AUTHORITIES

CASES:

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

AUTHORITIES:

TABLE OF CONTENTS--Continued

STATUTES AND CONSTITUTION:

In The Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff-Appellant,

vs.

ROY S. LUDLOW,
Defendant-Respondent.

Case No. 12981

Brief of Defendant-Respondent

STATEMENT OF FACTS

The plaintiff-appellant in its statement of facts has completed misstated or neglected to state the facts and issues in the instant case.

The proffer of proof at the preliminary hearing made by the plaintiff and defendant showed that on the 22nd day of April, 1971, a deputy sheriff, Mr. Tom World, went to the manufacturing plant of Hydroswift Corporation to serve a small claims affidavit and summons upon one Gayleen Thompson, who was then employed by Hydroswift Corporation (R-16). See 78-6-3, UCA, 1953 for form of affidavit and summons. The defendant was the president of said corporation.

Deputy World was advised by defendant that she was working in the manufacturing part of the plant in an area of volatile substances which were critical as to their nature and that she could not come to the administrative offices at that time to be served (R-17). The plant consist of three separate buildings including the administrative building. Mr. Ludlow stated that he would bring her up either at break time or after work so she could be served in the offices (R-17). Mr. World insisted that he would go back into the plant to serve the papers then and there and Mr. Ludlow advised him that he could not go back into the plant as no one was permitted in that area in which she was working other than authorized personnel (R-17). Deputy World being denied access to the manufacturing portion of the plant stated that he would be back and left. He returned the next day with a warrant of arrest charging the defendant with the indictable misdemeanor of obstructing an officer in the discharge of his duty in violation of Title 76, Chapter 28, Section 54, Utah Code Annotated 1953, to-wit:

> "That said John Doe aka Mr. Ludlow did then and there refuse to permit the said deputy sheriff on the premises for the purpose of serving civil process." (R-16)

Plaintiff-appellant for the first time upon appeal after no less than three hearings on this case raises the point that it was the duty of the defendant to "produce"

the person to be served to the deputy sheriff and this is the obstruction or resisting of which defendant is charged with. This is totally adverse with the argument raised previously by the plaintiff. Mr. Sawaya, the Deputy County Attorney argued solely the denial of the right of entry into private property as a violation of the law (R-139, lines 23-30, R-140, lines 1-2).

Plaintiff on page 5 of its brief states:

> "The defendant could have at least made an effort to determine (1) if the person whose name appeared on the process was indeed that of his employee and (2) if the employee was present on the defendant's premises."

This totally ignores the plaintiff's own proffer of proof where Deputy World admitted asking if Gayleen Thompson was an employee and admitted that defendant said she was (R-16) and was on the premises. (R-16)

ARGUMENT

POINT I

THERE IS NO STATE LAW WHICH REQUIRES AN EMPLOYER TO "PRESENT" AN EMPLOYEE TO A PROCESS SERVER FOR SERVICE OF PROCESS.

The information as filed does not allege that the defendant failed to produce a person for the service of process by a process server but charges the defendant with "then and there refused to permit the said deputy sheriff upon the premises for the purpose of serving civil process." (R-107)

Plaintiff in its argument and POINT I now refudiates the allegations of its own information upon which the criminal action was founded.

The State of Utah in the Bill of Particulars filed by it the 23rd day of February, 1972, alleged that the statutory basis upon which the State of Utah relies which permits a deputy sheriff to enter private property for the purposes of serving civil process to be 68-3-1, Utah Code Annotated 1953. (R-104)

There was no showing at the time of the preliminary hearing that defendant in any way had denied the deputy sheriff access into the office of the manufacturing company nor had ordered him out or off of the company property. (R-16-17) The preliminary hearing clearly showed that Deputy World in no way was denied access to the office but that he was denied access to the manufacturing portion of the plant. (R-17-18) The testimony of Deputy World in the proffer of proof made by the County Attorney was to the effect that the sheriff's office had been advised as to the time when service could be made on employees of Hydroswift by letter to the sheriff and that was at break time or after work.

The state seeks to show some statutory or legal duty for a party to produce another individual for the purposes of having civil process served upon him upon pain of criminal prosecution if he fails to do so. The state does not cite any statutory authority for this proposition but merely alleges that it relies upon the common law of the United States and of England. No case is cited nor any statutory law cited which requires a person to produce a third person to an officer of this state, without some type of writ, warrant or other legal court order—obviously there is none. This is actually a ludicrous position for the state to take inasmuch as an employer or other person has no control over a third person as to whether or not he will or will not be produced and to require a person under the pain and penalty of criminal prosecution to force a third person to appear before a sheriff or a process server is far and beyond the intent of the Thirteenth Amendment to the Constitution which did away with slavery or involuntary servitude, the only conditions under which an employer could compel an employee to appear. Apparently the State of Utah now takes the position that an employer has the right if not the duty to compel his employees to appear before public officers for any purpose whatsoever that the public officer may have in mind. Such is not the law and such is not the facts of the case now before the Court.

The real issue before the Court is whether or not the deputy sheriff, Tom World, had the right to enter

into the manufacturing portion of an industrial plant for the purposes of serving civil process. (R-17) This is the sole issue that was before the committing magistrate and before the District Court when it was argued by the County Attorney on numerous occasions in reply to the motions to dismiss and motions to quash filed by the defendant. The State of Utah is anything but candid in its brief and in its statement to the Court of the facts and issues before the Court.

POINT II

THE LAW DOES NOT ALLOW A PROCESS SERVER TO ENTER PRIVATE PROPERTY TO SERVE CIVIL PROCESS.

The State of Utah in its Bill of Particulars affirmatively relied, and relied solely, upon 68-3-1, Utah Code Annotated, 1953 as the basis for maintaining its criminal prosecution of the defendant in this case. The statute reads:

> "Common Law Adopted. The common law of England so far as it is not repugnant to, or in conflict with, the constitutional laws of the United States, or the constitutional laws of this state, and so far only as it is consistent with and adopted to the natural and physical conditions of this state and the necessities of

> the people hereof is hereby adopted and shall be the rule of decision in all courts of this state."

It is submitted that this particular section of law has no applicability in the instant case as the common law of England is repugnant to and in conflict with the Constitution of the United States and the case law of the United States and of the State of Utah.

No statutory law or rule or practice gives a sheriff the right to enter private property to serve process on a third person. See 17-22-2 UCA, 1953, Rule 4 URCP.

The leading case as to what the common law of England was is found in a case decided in 1604, *Semayne's Case*, 5 Coke 91(a), 77 ENG. Reprint, 194, 11 ENG. RUL. CAS. 628 (see footnote 5, LRA 1916 D 282) which held that the sheriff has no right to enter a private dwelling except with the king's writ and no other.

57 ALR 210 states:

> "The common law, both in England and America, jealous of intrusion on domestic peace and security, regards every man's house as his castle and fortress as well for his defense against injury and violence, as for his repose. It is this ancient and well-known principle that underlies the whole law of the right to break and enter a dwelling house to serve civil writ

or process. Accordingly, therefore, the authorities are substantially agreed that, as a general rule, in the absence of statute, the outer door or other outside protection to a dwelling house may not, even after request and refusal of admittance, be broken or forcefully entered for the purpose of levying under a writ of execution."

27 ALR 247 states:

"Preliminarily it may be noted that the common law does not permit an officer to break into a dwelling even after he has requested and has been refused permission to enter, for the purpose of serving a civil writ or process. This rule is founded on a desire to protect the home, and prevent injury and violence and is one application of the action that a man's home is his castle."

To the same effect see 42 AM JUR 34, Process, § 38.

The State, in its argument, would adopt the rule that a man's place of business does not have the same protections that his home does. This construction of the law is in direct conflict with the rulings of the Supreme Court of the United States and of cases decided by this Court in conformity with the mandates of the Supreme Court of the United States. In the case of *Mancusi v. DeForte*, 392 U.S. 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120 (1968) the Supreme Court stated:

> "This Court has held that the word 'houses' as it appears in the amendment (Fourth Amendment, U.S. Constitution) is not to be taken literally, and that the protection of the amendment may extend to commercial premises."

In the case of *See v. Seattle,* 387 U.S. 541, 18 L.Ed.2d 943, 87 S.Ct. 1737, it is stated:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. * * * "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public, may only be compelled through prosecution of physical force within the framework of a warrant procedure."

See also *Camara v. Municipal Court,* 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727.

POINT III

THE CONDUCT OF DEPUTY SHERIFF WORLD CONSTITUTED AN INVASION OF PRIVACY AND AN ATTEMPTED SEARCH WITHIN

THE MEANING OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The attempt of deputy sheriff World to enter into the confines of the manufacturing portion of the industrial plant constituted a search within the meaning of the prohibitions of the Fourth Amendment to the Constitution of the United States.

The Constitution of the United States provides in the Fourth Amendment thereto:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no one shall issue, but upon probably cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

To the same effect see Article I, Section 14 of the Constitution of Utah. As stated previously in *Mancusi v. DeForte*, supra, the word "houses" in the Fourth Amendment is not to be taken literally but includes within the protections of the amendment commercial premises.

The prohibitions of the Fourth Amendment go to the protection of one's right to be free from unwanted government intrusions into one's privacy.

The "property" concept as opposed to the "protection of privacy" has been laid to rest by the Supreme Court in the case of *Warden, Maryland Penitentiary vs. Hayden,* 387 U.S. 294, 18 L.Ed.2d 782, 87 S. Ct. 1642, wherein the Supreme Court stated:

> "Searches and seizures may be 'unreasonable' within the Fourth Amendment even though the government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly disregarded fictional and procedural barriers rested on property concepts."

That the Fourth Amendment is applicable to the states has been decided in *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed.2d. 1081, 81 S.Ct. 1684.

The doctrine of "unwarranted governmental intrusion" has been increasingly asserted by the Supreme Court of the United States. *Hoffa v. United States,* 385 U.S. 293, 17 L.Ed.2d 374, 87 S.Ct. 408. As stated in the case of *Stanley v. Georgia,* 394 U.S. 577, 22 L.Ed.2d. 542, 89 S.Ct. 1243:

> "For also fundamental is the right to be free, except in very limited circumstances, from unwanted government intrusions into one's privacy."

See to the same effect, *Camara v. Municipal Court*, supra, *See v. Seattle*, supra, *Katz v. U.S.*, 389 U.S. 347, 19 L.Ed.2d. 576, 88 S.Ct. 507, *Johnson v. U.S.*, 333 *U.S.* 10, 92 L.Ed. 436, 68 S.Ct 367.

The Supreme Court of Utah has affirmed the *Camara* and *See* rationale and in the case of *State v. Salt Lake City, et al*, 21 U.2d 318, 445 P.2d 691 (1968), Mr. Justice Callister in speaking for the majority observed:

> "In *See v. Seattle*, the Court held that the basic component of a reasonable search under the Fourth Amendment—that it is not to be enforced without suitable warrant procedure —is applicable to businesses as well as residential premises. Therefore, an entry upon commercial premises not open to the public may only be compelled within the framework of a warrant procedure."

As pointed out by Mr. Justice Henriod in his concurring opinion:

> "If an officer is on the premises lawfully for one purpose he not only can, but has a duty to make an arrest if in his browsing around, he sees an offense presently being or having been committed."

This reasoning is exactly the situation in the instant

case. The process server, a deputy sheriff, on the premises for serving of civil process could make an arrest for any alleged violation he came across while making his tour of the manufacturing plant while searching out the whereabouts of a person whom he was seeking to serve civil process upon. This is within the meaning of what Mr. Justice Henriod said about police "browsing around" on the private business premises without a search warrant.

In writing the majority decision in *Salt Lake City v. Wheeler,* 24 U.2d 112, 466 P.2d 838 (1970) Mr. Justice Henriod again pointed out that there was a "mythical distinction between 'browsing' inspection and 'bruising' search". In this case *See* and *Camara* were again affirmed by the Utah Supreme Court. In the case of *Wyman v. James,* 400 U.S. 309, 27 L.Ed.2d 408, 91 S. Ct. 381, the United States Supreme Court pointed out that where one refuses to allow a search of premises and such refusal will result in criminal prosecution, such situation invokes the *Camara* and *See* doctrine of unlawful search. This is the exact situation the defendant in this case found himself in. If he did not admit the deputy sheriff, he was subject to prosecution and if he did admit him, his right to privacy and freedom of governmental intrusion was violated. The constitutional guarantee of the Fourth Amendment runs both as to criminal or civil matters. *U.S. v. Undetermined Quantities of Stimulant Drugs* (D.C. Fla., 1968), 282 F.Supp. 543; *People v. Garcia,* (1969) 74 Cal. Rptr.

103, 268 C.A.2d 712; *Rogers v. U.S.* (1938) 97 F.2d 691. See *Pride Club, Inc. v. State,* 24 U.2d 333, 481 P.2d 669, (1971).

POINT IV

THE UTAH LAW OF WHAT IS MEANT BY "RESIST, DELAYS OR OBSTRUCTS" IS VAGUE AND UNCERTAIN AND IS THEREBY UNCONSTITUTIONAL AS APPLIED IN THE INSTANT CASE AND VIOLATIVE OF DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

It is submitted that the words "resist, delays or obstructs" is left up to the determination of the public officer who claims that he was resisted, delayed or obstructed. What may be resistance to one is not necessarily resistance to another. What may be a delay to one is not a delay to another, and what is an obstruction to one is not necessarily an obstruction to a third person. Consequently, this is a judgment determination of the public officer who seeks criminal prosecution for a violation of 76-28-54, UCA, 1953, as is the defendant in the instant case.

The Supreme Court of the United States has had

many occasions to pass upon words of art in various city ordinances and state statutes which invoke criminal sanction where one has transgressed by action or deed in violation of the meaning of a particular word. In a recent Supreme Court of the United States case, *Coates v. Cincinnati,* 402 U.S. 611, 29 L.Ed.2d. 214, 91 S.Ct. 1686 (1971) the Supreme Court in reversing a conviction of the person charged with having annoyed persons passing on a sidewalk observed:

> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague not in the sense that it requires a person to conform his standard, but rather in the sense that no standard of conduct is specified at all. As a result 'men of common intelligence must necessarily guess at its meaning', *Connelly v. General Construction Company,* 269 U.S. 385, 391, 70 L.Ed. 322, 382, 46 S.Ct. 126."

It is to be noted that there is a distinction between a statute which is unconstitutional on its face and a statute which is unconstitutional as applied. In the instant case, it is the contention of the defendant that 76-28-54 is unconstitutional as applied in this case. As observed by the Supreme Court in the case of *Shuttlesworth v. Birmingham,* 382 U.S. 87, 15 L.Ed.2d. 176, 180, 86 S.Ct. 211:

> "As so construed, we cannot say that the ordinance is unconstitutional, though it requires

> no great feat of imagination to envision situations in which such an ordinance might be *unconstitutionally applied.*" (Emphasis added)

In the case of *Simon Bouie v. Columbia,* 378 U.S. 347, 12 L.Ed.2d. 894, 84 S.Ct. 1697, the Supreme Court held that:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

In the instant case the state now takes the position that the person has the duty to produce a third person for the service of process upon him. Where in the statutes of Utah is such conduct required? Where within the meaning of 76-28-54 can one of "reasonable intelligence" determine that his failure to produce a third person for service of process upon him is a violation of the laws of Utah? In the authoritative work of Lawyers Edition, following the rendition of the opinion of the Supreme Court of the United States in *Ashton v. Kentucky,* 384 U.S. 195, 16 L.Ed.2d. 469, 86 S.Ct. 1407 (1966), an annotation dealing with "indefiniteness of penal laws", found at page 1233 of 16 L.Ed.2d. states:

"The requirement that crimes be defined with appropriate definiteness, which has been referred to as a fundamental common law concept, is now generally held to be an essential element of due process of law. The constitutional requirement of definiteness is violated by a criminal enactment that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. While this rule has been expressed in varying language, the underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. A generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute. Inexplicably contradictory commands in statutes ordaining criminal penalties are judicially denied the force of criminal sanction."

"Reasonable certainty in criminal enactments is all the more essential when vagueness might

> induce individuals to forego their rights of speech, press and association for fear of violating an unclear law."

In the case of *Giaccio v. Pennsylvania,* 382 U.S. 399, 15 L.Ed.2d. 477, 86 S.Ct. 518 (1965) it was pointed out that a statute fails to meet the requirements of the due process clause of the Constitution of the United States if its so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not. See also *United States v. National Dairy Products Corporation,* 372 U.S. 29, 9 L.Ed.2d. 561, 83 S.Ct. 594 (1963); *Scull v. Virginia,* 359 U.S. 344, 3 L.Ed.2d. 865, 79 S.Ct. 838 (1959); *United States v. Five Gambling Devices,* 346 U.S. 441, 98 L.Ed. 179, 74 S.Ct. 190 (1953). Perhaps the latest case speaking on the subject is that of *Palmer v. City of Euclid,* 402 U.S. 544, 29 L.Ed.2d. 98, 91 S.Ct. 1563 (1971) wherein the Supreme Court in quoting from *U.S. v. Harriss,* 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808 (1954) said:

> "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

The Supreme Court of Utah has recognized the doctrines as announced by the Supreme Court of the

United States. In the case of *Ringwood v. State,* 8 U.2d 287, 333 P.2d 943, the Supreme Court stated:

> "We remain aware of the requirements of our law that our statutes are to be given a liberal interpretation to effectuate their purposes. That having been said, however, it must also be recognized that where a statute charges one with a duty or imposes a burden or penalty, it must do so with sufficient clarity and definiteness that one of ordinary intelligence will understand what he is required to do. And in case of alernative choices, he can comply by selecting the one which is the least burdensome or least offensive to him."

See also *State v. Packard,* 122 U. 369, 250 P.2d 561 (1952); *Kent Club v. Toronto,* 6 U.2d 67, 305 P.2d 870 (1957); *Henry v. Rocky Mountain Packing Corporation,* 113 U. 444, 202 P.2d 727, wherein the Supreme Court observed:

> "It is a principle too familiar to require citation of authority, that penal statutes, to be constitutional, must be clear and definite in their terms so that there may be known exactly what conduct is proscribed."

See also *Musser v. State of Utah,* 333 U.S. 95, 92 L.Ed. 562, 68 S.Ct. 397, wherein the Supreme Court of the United States in striking down a Utah law stated:

> "Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt." (Citing cases) "Legislation may run a foul of the due process clause because it fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged or to guide courts in trying those who are accused."

The statute as applied in the instant case violates the due process clauses of the Fifth and Fourteenth Amendments.

CONCLUSION

It is respectfully submitted that the District Court did not err in quashing the information against the defendant.

The state offered no authority for the proposition that a deputy sheriff has the right to enter the private domain of a person to serve civil process on another, which contradicted or distinguished the mandates of *Camara* and *See*.

The State in its brief on appeal has offered no authority for the proposition that it is the legal duty for an employer to produce his employee for a public official, and his failure so to do will subject him to criminal prosecution.

It is submitted that the trial court should have ruled upon the constitutional issues raised by defendant, that is the unlawful search under the Fourth Amendment and the vague and uncertainity of 76-28-54, UCA, 1953, making it unconstitutional as applied. Defendant now requests this court to rule upon the unconstitutionality of the conduct of Deputy World, and upon the unconstitutionality of 76-28-54, UCA, 1953.

Respectfully Submitted.

PAUL N. COTRO-MANES

Attorney for Defendant-Respondent